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LIPUTAN SIMFONI SDN BHD v. PEMBANGUNAN ORKID DESA SDN BHD

FEDERAL COURT, PUTRAJAYA
HASAN LAH FCJ
RAMLY ALI FCJ
B AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPEAL NO: 02(F)-111-12-2016(W)]
7 SEPTEMBER 2018

C

LAND LAW: *Transfer – Validity – Transfer of land – Subsequent bona fide purchaser for value – Relevant time for determination of good faith of subsequent purchaser – Whether at time of entering into transaction or at time of registration by land officer – Principle of good faith for purpose of s. 340(3) of National Land*
D *Code – Whether general common law principle of good faith or some other specific principle of good faith – Test for determining good faith – Whether must show absence of fraud, deceit or dishonesty – Whether added imposition of taking ordinary precautions and investigations of reasonable prudent purchaser – Whether mere knowledge of adverse claim vitiates good faith of subsequent purchaser*

E ***LAND LAW:*** *Indefeasibility of title – Registered owner – Transfer of land – Validity of transfer – Subsequent bona fide purchaser for value – Whether acted as reasonably prudent purchaser – Whether absence of fraud, deceit or dishonesty shown – Whether transfer obtained by means of void instrument – Whether title obtained by subsequent purchaser defeasible – National Land Code, s. 340(2) & (3)*

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The respondent ('plaintiff') was the registered proprietor of a piece of land. On 15 October 2004, an imposter company claiming to be the plaintiff, applied to the third defendant, Pendaftar Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur, for a replacement issue document of title alleging that it had lost the original document of title to the land. The third
G defendant issued a replacement issue document of title and subsequently, the imposter company entered into a sale and purchase agreement ('the first SPA') to sell the land to the second defendant. Upon completion of the sale, the second defendant was registered as the owner of the land. Subsequently, on 25 August 2006, the second defendant entered into a sale and purchase
H agreement with the appellant ('the first defendant'), Liputan Simfoni Sdn Bhd for the sale of the land ('the second SPA'). Prior to the completion of the second SPA, the imposter company entered a private caveat. The first defendant presented the memorandum of transfer for the subject land together with Form 19G of the National Land Code ('NLC'), the notice to withdraw

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the caveat. However, upon the request by the imposter company, a Registrar's caveat was entered against the subject land, as a result of which the first defendant could not be registered as proprietor of the land. The plaintiff, upon discovering that the land was registered in the name of the second defendant and that there was another pending transfer, lodged a police report and notified the third defendant. The second defendant, *via* an application to the High Court, successfully removed the Registrar's caveat and consequently, the first defendant was registered as the proprietor of the land but with effect from the date on which the memorandum of transfer was originally presented, namely, 20 December 2006. The plaintiff was never informed nor made a party to the proceedings. A private caveat lodged by the plaintiff on 7 September 2012 was also removed by the third defendant. The plaintiff thus commenced this suit against all three defendants seeking, *inter alia*, declarations that the transfers of the land to the first and second defendants were void *ab initio*, and orders that the subject land be restored to the plaintiff and that the third defendant to rectify the entries in the document of title of the subject land. The High Court allowed the plaintiff's claim, holding, *inter alia*, that the transfer of the land from the second defendant to the first defendant was obtained by means of a void instrument which, in turn, rendered the title of the first defendant defeasible pursuant to s. 340(2) of the NLC, thereby restoring the subject land to the plaintiff. The Court of Appeal affirmed the decision of the High Court and hence, leave to appeal was allowed to the first defendant, on the following questions of law: (i) whether the relevant time for the determination of good faith of a subsequent purchaser for the purpose of s. 340(3) of the NLC is based on the circumstances at the time of entering into the transaction or at the time of registration by the land officer; (ii) whether the principle of good faith for the purpose of s. 340(3) of the NLC is that of the general common law principle of good faith or some other specific principle of good faith; (iii) whether the test for determining good faith of a subsequent purchaser is the absence of fraud, deceit or dishonesty; or is there an added imposition of taking ordinary precautions and investigations of a reasonable prudent purchaser; (iv) whether mere knowledge of an adverse claim vitiates good faith of the subsequent purchaser who is not fraudulent, deceitful or dishonest; If yes, at which point in the transaction does such knowledge vitiate good faith; (v) whether a finding that a sale and purchase agreement is void *ab initio* pursuant to s. 24(b) Contracts Act 1950 renders the Form 14A under the NLC void, despite the Form 14A being a valid instrument duly registered in favour of the subsequent *bona fide* purchaser with the Land Office; and (vi) whether 'instrument' for the purposes of s. 340(2)(b) of the NLC refers to documents presented to the Land Office for registration of title or does it also extend to a sale and purchase agreement.

A B C D E F G H I

Held (dismissing appeal with costs; affirming decisions of courts below) Per Hasan Lah FCJ delivering the judgment of the court:

(1) The Court of Appeal in *Ong Ban Chai & Ors v. Seah Siang Wong* had conflated the concepts of fraud under s. 340(2)(a) and a *bona fide* purchaser under the proviso to s. 340(3) of the NLC. When the Federal Court dealt with the issue of *bona fide* purchaser for value in *Pekan Nenas Industries Sdn Bhd v. Chong Ching Chuen & Ors,* it was confined to the issue of whether a person is necessarily disqualified from being a *bona fide* purchaser for value if he has not paid the full purchase price under the contract for sale and not in the context of the proviso to s. 340(3) of the NLC. Both the High Court and the Court of Appeal, in this case, were correct in preferring the broader concept of good faith as laid down in *Au Meng Nam & Anor v. Ung Yak Chew & Ors*, that is to say, in order to discharge the burden of showing that it is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. The question of whether a purchaser has acted as a reasonably prudent purchaser or not would have to be decided on the particular facts of each case. (paras 79 & 82)

(2) The presentation of the relevant instrument of dealing for registration was made on 28 December 2006 and the registration was done only on 11 February 2010 which was more than three years after the presentation. There are two stages in the registration of title under the Torrens system, the pre-registration stage and post-registration stage. In pre-registration stage, the purchaser does not acquire any proprietary rights but contractual rights. Such rights do not bind on the land but the contracting parties. The first defendant only acquired the proprietary right in the subject land upon the registration of the title in its name on 11 February 2010. (paras 94 & 98)

(3) Therefore, the relevant time for determination of good faith of a subsequent purchaser for the purposes of s. 340(3) of the NLC is the circumstances prior and at the time of the registration of the transfer by the land officer. The purchaser can only seek protection under s. 340(3) of the NLC if he is registered as the transferee pursuant to ss. 215 or 217 of the NLC. Section 340(3) does not provide protection to a purchaser who has not been registered as a registered proprietor of the land. Accordingly, the purchaser's conduct until registration is material for the purposes of ascertaining his *bona fides*. Cognizance may be taken of his acts or omissions over a period prior to the entry into the sale and

purchase transaction of the land, up to the point in time when the purchaser is registered as a proprietor on the Register of Titles. (paras 102 & 130)

(4) The question of whether the first defendant was a *bona fide* purchaser for value is a question of fact. The High Court found that the first defendant had not proven, on a balance of probabilities, that it was a purchaser in good faith and for valuable consideration. It is trite law that the appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrust the primary task of evaluation of the evidence unless the trial court has so fundamentally misdirected itself. On the totality of the evidence, there was no misdirection by the trial court in this case. (paras 104 & 105)

(5) The second SPA was not void. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 ('RPGTA') were not the pre-requisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act provides a penalty for breach of its provisions. Similarly, under the RPGTA, there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceedings as a debt to the Government. The object of the two Acts is to raise revenue. Therefore, there was no sufficient nexus between the statutory requirement and the contract (*Curragh Investment Ltd v. Cook*). The first defendant's infringement of the two Acts did not prevent it from suing on the contract which was legal. (para 125)

(6) In view of the finding that the second SPA was not void, it was not necessary to deal with the issue as to whether the second SPA was an instrument for the purpose of s. 340(2)(b) of the NLC. (paras 127 & 129)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') adalah pemilik berdaftar sebidang tanah. Pada 15 Oktober 2004, sebuah syarikat penyamar yang mengaku sebagai plaintif, memohon kepada defendan ketiga, Pendaftar Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur, untuk dokumen hak milik ganti dengan dakwaan kehilangan dokumen hak milik tanah yang asal. Defendan ketiga mengeluarkan dokumen hak milik ganti dan kemudian, syarikat penyamar tersebut memasuki perjanjian jual beli ('PJB pertama') untuk menjual tanah kepada defendan kedua. Setelah jualan selesai, defendan kedua didaftarkan sebagai pemilik tanah tersebut. Selepas itu, pada 25 Ogos 2006, defendan kedua memasuki perjanjian jual beli dengan perayu ('defendan pertama'), Liputan Simfoni Sdn Bhd, untuk jualan tanah tersebut ('PJB kedua').

Sebelum penyelesaian PJB kedua, syarikat penyamar memasukkan kaveat persendirian. Defendan pertama mengemukakan memorandum pindah milik untuk tanah itu bersama-sama dengan Borang 19G Kanun Tanah Negara ('KTN'), notis untuk menarik balik kaveat. Walau bagaimanapun, atas permohonan syarikat penyamar, kaveat Pendaftar dimasukkan atas tanah itu, dan akibatnya defendan pertama tidak boleh didaftarkan sebagai pemilik tanah. Plaintif, apabila mengetahui tanah itu didaftarkan dalam nama defendan kedua dan terdapat satu lagi pindah milik yang menunggu pendaftaran, membuat laporan polis dan memaklumkan defendan ketiga. Defendan kedua, melalui satu permohonan kepada Mahkamah Tinggi, berjaya membatalkan kaveat Pendaftar tersebut dan dengan itu, defendan pertama didaftarkan sebagai pemilik tanah tetapi berkuat kuasa dari tarikh apabila memorandum pindah milik dikemukakan pada asalnya, iaitu, 20 Disember 2006. Plaintif tidak pernah dimaklumkan atau dijadikan pihak dalam prosiding. Satu kaveat persendirian didaftarkan oleh plaintif pada 7 September 2012 yang juga dikeluarkan oleh defendan ketiga. Plaintif, oleh itu, memulakan tindakan ini terhadap ketiga-tiga defendan memohon, antara lain, deklarasi bahawa pindah milik tanah kepada defendan kedua dan pertama terbatal *ab initio*, dan perintah-perintah bahawa tanah tersebut dikembalikan kepada plaintif dan agar defendan ketiga membetulkan daftar hak milik tanah tersebut. Mahkamah Tinggi membenarkan tuntutan plaintif, memutuskan, antara lain, bahawa pindah milik tanah daripada defendan kedua kepada defendan pertama diperoleh melalui instrumen tidak sah, yang dengan itu, mengakibatkan hak milik defendan pertama boleh disangkal menurut s. 340 KTN, dan oleh itu, mengembalikan tanah kepada plaintif. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan dengan itu, kebenaran merayu diberikan kepada defendan pertama, atas soalan-soalan undang-undang berikut: (i) sama ada masa relevan untuk memutuskan kejujuran pembeli terkemudian untuk tujuan s. 340(3) KTN berdasarkan hal keadaan pada masa memasuki transaksi tersebut atau pada masa pendaftaran oleh pegawai tanah; (ii) sama ada prinsip kejujuran untuk tujuan s. 340(3) KTN adalah menurut prinsip kejujuran common law umum atau prinsip kejujuran lain yang spesifik; (iii) sama ada ujian untuk menentukan kejujuran pembeli terkemudian adalah ketiadaan penipuan, perdayaan atau ketidakjujuran; atau perlu ada langkah berjaga-jaga tambahan dan penyiasatan pembeli munasabah; (iv) sama ada pengetahuan semata-mata tentang tuntutan bertentangan membatalkan kejujuran pembeli terkemudian yang bukan penipuan perdayaan atau tidak jujur; Jika ya, pada peringkat mana transaksi, pengetahuan sedemikian membatalkan kejujuran; (v) sama ada dapatan bahawa perjanjian jual beli terbatal *ab initio* menurut s. 24(b) Akta Kontrak 1950 menyebabkan Borang 14A KTN terbatal, walaupun Borang 14A adalah instrumen sah yang didaftarkan sewajarnya berpihak kepada pembeli *bona*

fide terkemudian dengan Pejabat Tanah; dan (vi) sama ada 'instrumen' untuk tujuan s. 340(2)(b) KTN merujuk pada dokumen-dokumen yang dikemukakan di Pejabat Tanah untuk pendaftaran hak milik atau sama ada ia berlanjut pada perjanjian jual beli. A

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan mahkamah-mahkamah di bawah) B
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan dalam *Ong Ban Chai & Ors v. Seah Siang Wong* menggabungkan konsep fraud bawah s. 340(2)(a) dan pembeli *bona fide* bawah s. 340(3) KTN. Apabila Mahkamah Persekutuan memutuskan isu pembeli *bona fide* untuk nilai dalam *Pekan Nenas Industries Sdn Bhd v. Chong Ching Chuen & Ors* ia terhad pada isu sama ada seseorang perlu disingkirkan sebagai pembeli *bona fide* untuk nilai jika dia tidak membayar harga penuh belian bawah kontrak jualan dan bukan dalam konteks proviso kepada s. 340(3) KTN. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan, dalam kes ini, betul dalam memilih konsep luas kejujuran seperti yang dinyatakan dalam kes *Au Meng Nam & Anor v. Ung Yak Chew & Ors*, iaitu, untuk melepaskan beban menunjukkan bahawa ia adalah pembeli dengan niat baik dan untuk balasan bernilai, pembeli mesti menunjukkan bukan sahaja ketiadaan penipuan, perdayaan atau ketidakjujuran, malahan bahawa langkah berjaga-jaga biasa yang seseorang pembeli munasabah yang bijak akan ambil dalam hal keadaan tersebut, telah diambil. Soalan sama ada seorang pembeli telah bertindak sebagai pembeli munasabah yang bijak atau tidak, perlu diputuskan berdasarkan fakta-fakta tertentu setiap kes. C D E

(2) Pengemukaan instrumen relevan untuk pendaftaran dibuat pada 28 Disember 2006 dan pendaftaran dibuat hanya pada 11 Februari 2010, lebih tiga tahun selepas pengemukaannya. Terdapat dua peringkat dalam pendaftaran hak milik dalam sistem Torrens, peringkat pra-pendaftaran dan peringkat selepas pendaftaran. Dalam peringkat pra-pendaftaran, pembeli tidak memperoleh apa-apa hak proprietari tetapi hak kontrak. Hak sedemikian tidak mengikat tanah tetapi pihak-pihak berkontrak. Defendan pertama hanya memperoleh hak proprietari dalam tanah selepas pendaftaran hak milik atas namanya pada 11 Februari 2010. F G

(3) Oleh itu, masa yang relevan untuk menentukan kejujuran pembeli terkemudian untuk tujuan s. 340(3) KTN dalam hal keadaan sebelum dan pada masa pendaftaran pindah milik oleh pegawai tanah. Pembeli hanya boleh meminta perlindungan bawah s. 340(3) KTN jika dia berdaftar sebagai penerima pindah milik menurut ss. 215 atau 217 KTN. Seksyen 340(3) tidak memperuntukkan perlindungan kepada pembeli yang tidak berdaftar sebagai pemilik berdaftar tanah. Berikutan itu, H I

tindakan pembeli sehingga pendaftaran adalah penting untuk menentukan kejujurannya. Perhatian boleh diberi untuk tindakan atau ketinggalannya bagi tempoh sebelum memasuki transaksi jual beli tanah, sehingga masa apabila pembeli berdaftar sebagai pemilik dalam Daftar Hak Milik.

(4) Soalan sama ada defendan pertama adalah pembeli suci hati untuk nilai adalah persoalan fakta. Mahkamah Tinggi mendapati defendan pertama tidak membuktikan, atas imbangan kebarangkalian, bahawa defendan pertama pembeli suci hati dan untuk balasan bernilai. Undang-undang matan bahawa mahkamah rayuan tidak akan terus campur tangan dengan dapatan fakta mahkamah bicara di mana undang-undang mengamanahkan tugas penting menilai keterangan kecuali jika mahkamah bicara pada asasnya tersalah arah. Atas keseluruhan keterangan, tiada salah arahan oleh mahkamah bicara dalam kes ini.

(5) Perjanjian jual beli kedua tidak batal. Pematuhan Akta Setem 1949 dan Akta Cukai Keuntungan Harta Tanah 1976 ('ACKHT') bukan pra-syarat untuk PJB kedua berkuat kuasa. Tiada larangan bawah kedua-dua Akta tersebut yang menghalang defendan pertama daripada memperoleh hak dalam tanah itu. Akta Setem memperuntukkan penalti untuk pelanggaran peruntukannya. Begitu juga, bawah ACKHT, terdapat penalti-penalti untuk pelanggaran peruntukannya. Tambahan lagi, diperuntukkan bahawa cukai yang tertunggak dan perlu dibayar boleh diperoleh semula oleh Kerajaan melalui prosiding sivil sebagai hutang kepada Kerajaan. Tujuan kedua-dua Akta adalah menambahkan hasil. Oleh itu, tiada hubungan yang mencukupi antara keperluan statutori dan kontrak (*Curragh Investment Ltd v. Cook*). Pelanggaran kedua-dua Akta oleh defendan pertama tidak menghalangnya daripada menyaman atas kontrak yang sah.

(6) Berdasarkan dapatan bahawa PJB kedua tidak batal, tiada keperluan untuk memutuskan isu sama ada PJB kedua adalah instrumen untuk tujuan s. 340(2)(b) KTN.

Case(s) referred to:

Asia Television Ltd & Anor v. Viwa Video Sdn Bhd & Other Cases [1984] 2 CLJ 80; [1984] 1 CLJ (Rep) 72 FC ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Bowmakers Ltd v. Barnet Instruments Ltd [1944] 2 All ER 579 ***(refd)***

Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909 FC ***(refd)***

Curragh Investments Ltd v. Cook [1974] 1 WLR 1559 ***(refd)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(foll)***

Eaton v. Ldc Finance Ltd (in receivership) [2012] NZHC 1105 ***(refd)***

Holman v. Johnson [1775] 1 Cowp 341 ***(refd)***

James Blackwood and Charles Ibbotson v. The London Chartered Bank of Australia [1874] LR 5 PC 92 ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Kin Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Macmillan Inc v. Bishopsgate Investment Trust plc and Others (No 3) [1995] 3 All ER 747 ***(refd)***
Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd [2017] 4 CLJ 24 FC ***(refd)***
Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] 1 LNS 114 ***(refd)***
Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal [2014] 6 CLJ 485 CA ***(refd)***
Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
Patel v. Mirza [2017] 1 All ER 191 ***(foll)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Pilcher v. Rawlins (1872) LR 7 Ch App 259 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
St John Shipping Corp v. Joseph Rank Ltd [1956] 3 All ER 683 ***(refd)***
Stuart v. Kingston [1923] 32 CLR 309 ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
The Co-operative Central Bank Limited (In receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***
Tinsley v. Milligan [1993] 3 All ER 65 ***(refd)***
UMBC v. Pekeliling Triangle Sdn Bhd [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474 SC ***(refd)***
Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 67, 133(1)
Contracts Act 1950, s. 24(b)
Courts of Judicature Act 1964, s. 78(1)
National Land Code, ss. 89, 215, 217(2), 292, 304(1), (3), 340(2)(a), (b), (3), 418
Specific Relief Act 1950, s. 26(b)
Stamp Act 1949, s. 4

Other source(s) referred to:
SY Kok, *The Torrens System And Equitable Principles,* p 33

For the appellant - Yeoh Cho Kheong, Nadesh Ganabaskaran, Mahendran Shunmugam Sundram & Saw Wei Siang; M/s Malek, Paulian & Gan
For the respondent - Palanivel KV Sathasivam, Ho How Keong, Balbir Singh & Premkumar Danapal; M/s Palani Aishah & Co

[Editor's note: For the Court of Appeal judgment, please see Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2018] 1 CLJ 61 (affirmed).
For the High Court judgment, please see Pembangunan Orkid Desa Sdn Bhd v. Liputan Simfoni Sdn Bhd & Ors [2016] 1 CLJ 664 (affirmed).]

Reported by S Barathi

JUDGMENT

Hasan Lah FCJ:

Introduction

[1] This case again highlighted the difficulty in resolving the competing claims between an innocent landowner and a purchaser of a piece of land which was the subject matter of a fraudulent transaction under s. 340(2) of the National Land Code ("Code").

[2] The High Court allowed the original owner's claim, thereby restoring the subject land to the original owner. The Court of Appeal affirmed the decision of the High Court.

[3] On 8 December 2016, leave to appeal was allowed to the appellant, the purchaser, on the following questions of law:

Question 1: Whether the relevant time for the determination of good faith of a subsequent purchaser for the purpose of s. 340(3) of the National Land Code ("NLC") is based on the circumstances at the time of entering into the transaction or at the time of registration by the land officer?

Question 2: Whether the principle of good faith for the purpose of s. 340(3) of the NLC is that of the general common law principle of good faith or some other specific principle of good faith?

Question 3: Whether the test for determining good faith of a subsequent purchaser is that the absence of fraud, deceit or dishonesty; or is there an added imposition of taking ordinary precautions and investigations of a reasonable prudent purchaser?

Question 4: Whether mere knowledge of an adverse claim vitiates good faith of the subsequent purchaser who is not fraudulent, deceitful or dishonest? If yes, at which point in the transaction does such knowledge vitiate good faith: (i) entering into the transaction, (ii) presentation of memorandum of transfer at the Land Office, or (iii) registration of title by the land officer?

Question 5: Whether a finding that a sale and purchase agreement is void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950 renders the Form 14A under the NLC void, despite the Form 14A being a valid instrument duly registered in favour of the subsequent *bona fide* purchaser with the Land Office?

Question 6: Whether 'instrument' for the purposes of s. 340(2)(b) of the NLC refers to documents presented to the Land Office for registration of title or does it also extend to a sale and purchase agreement?

[4] In this judgment, the parties will be referred to as they were in the High Court.

Background Facts

[5] The background facts leading to this appeal are these. The plaintiff (Pembangunan Orkid Desa Sdn Bhd) was the registered proprietor of a piece of land held under Grant No. 5309, Lot 2788 Mukim Petaling, Wilayah Persekutuan ("subject land").

[6] On or about 15 October 2004, an imposter company claiming to be Pembangunan Orkid Desa Sdn Bhd (but with a different company number, namely 9048-D instead of 31550-U) applied to the third defendant (Pendaftar Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur) for a replacement issue document of title alleging that it had lost the original document of title of the subject land. The original document of title was at all material times in the possession of the plaintiff.

[7] The company number 9048-D in actual fact belonged to a company known as Pembangunan Bersatu Sdn Bhd.

[8] On 19 May 2005, the third defendant issued a replacement issue document of title described as Grant No. 9971, Lot No. 2788 Mukim of Petaling, Wilayah Persekutuan.

[9] On 23 January 2006, the imposter company entered into a sale and purchase agreement ("first SPA") to sell the subject land to Chai Sit Trading Sdn Bhd (the second defendant) for a sum of RM680,000. The sale was completed on or around 31 May 2006, after which the second defendant was registered as the owner of the subject land.

[10] On 25 August 2006, the second defendant entered into a sale and purchase agreement with Liputan Simfoni Sdn Bhd (the first defendant) to sell the subject land for a price of RM900,000 ("second SPA"). However, an additional sum of RM870,000 stated to be for the costs of earthworks, was paid by the first defendant to the second defendant.

[11] On 25 September 2006, prior to the completion of the second SPA, the imposter company entered a private caveat, alleging that the second defendant had not settled the balance of the purchase price.

[12] On 28 December 2006, the first defendant presented the memorandum of transfer for the subject land together with Form 19G of the Code, the notice to withdraw the caveat.

[13] On 21 February 2007, the imposter company wrote to the third defendant requesting for a Registrar's caveat to be entered against the subject land on the ground that the withdrawal of the private caveat was done without its knowledge. A Registrar's caveat was duly entered against the subject land on 27 March 2007, as a result of which the first defendant could not be registered as proprietor of the subject land.

[14] At some point, a director of the plaintiff found out that someone had started to clear the subject land. The plaintiff conducted a land search and discovered that the land was registered in the name of the second defendant and there was another pending transfer submitted on 28 January 2006. The search also disclosed that the Registrar's caveat had been entered against the title.

[15] On 24 April 2008, the plaintiff lodged a police report stating that it had never sold the subject land and that its original issue document of title was still in its possession. The plaintiff also notified the third defendant.

[16] A meeting was held by the third defendant on 7 November 2008 to investigate into the transfers of the subject land. It was attended by the representative of the plaintiff, the first defendant, the second defendant and the police. However, there were no minutes nor other records in the third defendant's possession to show the outcome of this investigation.

[17] Soon after this meeting, the second defendant applied to court to have the Registrar's caveat removed. The third defendant was named as the respondent in the originating motion filed on 7 January 2009. The first defendant intervened and was added as a party. The plaintiff was, however, never informed nor made a party to the proceeding. The third defendant did, in its affidavit, maintain that the plaintiff ought to be joined as a party in the proceeding as it had interest in the subject land.

[18] The first and second defendants opposed the application to have the plaintiff joined as a party in the proceeding. As a result, the entire matter was disposed of without the plaintiff being given the right to be heard.

[19] On 19 November 2009, the High Court allowed the second defendant's application to remove the Registrar's caveat on the title of the subject land. The caveat was removed on 22 January 2010.

[20] The first defendant was then registered as the proprietor of the subject land on 11 February 2010 but with effect from the date on which the memorandum of transfer was originally presented, namely 20 December 2006.

[21] On 7 September 2012, the plaintiff lodged a private caveat over the subject land. The caveat was removed by the third defendant when it was discovered that the plaintiff's director who had attested to the affixing of the common seal of the plaintiff on Form 19B for the lodgement of the caveat was bankrupt at the material time.

[22] In February 2013, the plaintiff filed this suit against all the three defendants seeking for *inter alia*, declarations that the transfers of the subject land to the second and first defendants are void *ab initio*, and orders that the subject land be restored to the plaintiff and that the third defendant do rectify the entries in the document of title of the subject land.

Decisions Of The High Court

[23] The High Court allowed the plaintiff's claim. The High Court concluded that the transfer of the subject land to the second defendant was effected pursuant to a forged instrument by the imposter company. As such, the second defendant's title was defeasible under s. 340(2)(b) of the Code.

[24] The High Court concluded that the first defendant's title would also be defeasible unless it could avail itself of the proviso to s. 340(3) of the Code. The High Court found that the first defendant failed to establish it was a purchaser in good faith and for valuable consideration.

[25] The High Court held that the relevant time at which knowledge or means of knowledge for the purpose of determining whether a purchaser is a *bona fide* purchaser for the purpose of the proviso to s. 340(3) of the Code is at the time the purchaser was registered as a proprietor of the subject land and not at the time of the entry into the transaction. As such, all and any circumstances of the purchaser prior to the registration may be validly taken into account in determining the issue of whether or not such purchaser was acting in good faith.

[26] As regards the meaning of "good faith", it was held that the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances.

[27] On the facts of the case, the High Court found that the first defendant had not proven that it was a purchaser in good faith and for valuable consideration. The first defendant's title was held to be defeasible pursuant to s. 340(2) of the Code and the Register of Titles was ordered to be rectified to state that the plaintiff was the registered proprietor of the subject land.

[28] It was further held that the second SPA was void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950 because it had the effect of evading the payment of real property gains tax on the undeclared profit and the payment of stamp duty on the additional consideration. As such, the transfer of the title for the subject land from the second defendant to the first defendant was obtained by means of a void instrument, which in turn renders the title of the first defendant defeasible pursuant to s. 340(2) of the Code.

Decisions Of The Court Of Appeal

[29] The Court of Appeal agreed with the findings of the High Court and dismissed the first defendant's appeal.

[30] The Court of Appeal affirmed the decision of the High Court that the relevant time to determine whether a purchaser is a purchaser in good faith and for valuable consideration would be upon registration as title is only acquired at that point. Cognizance may be taken of acts and omissions over the period prior to the entry into the sale and purchase transaction for the subject land up to the time when the purchaser was registered as a proprietor in the Register of Titles.

[31] The Court of Appeal agreed with the finding of the High Court that the first defendant on the facts of the case was not a purchaser in good faith and for valuable consideration.

[32] Lastly, the Court of Appeal also agreed with the High Court that the second SPA was void pursuant to s. 24(b) of the Contracts Act 1950 because it deprived the Government of revenue. The Court of Appeal held that the second SPA was a void instrument as stipulated under s. 340(2)(b) of the Code.

Submission Of The First Defendant

[33] With regard to the issue of "purchaser in good faith" under the proviso to s. 340(3) of the Code, learned counsel for the first defendant submitted that there are two lines of authorities on what amounted to "purchaser in good faith", namely *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346 and the other, *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136.

[34] The *Ong Ban Chai* line of authorities merely states that a purchaser is a "purchaser in good faith" if there is absence of fraud, deceit or dishonesty. On the other hand, *Au Meng Nam* states that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. The purchaser "is under the obligation to investigate properly all matters relating to the sale of land and not just blindly accept what was claimed by the vendors as correct and genuine".

[35] Learned counsel for the first defendant submitted that the *Ong Ban Chai* line of authorities is consistent with the natural and ordinary meaning of good faith as stated in *Black's Law Dictionary*. It is also consistent with the definition of good faith accorded by the High Court of Australia in *Stuart v. Kingston* [1923] 32 CLR 309.

[36] Learned counsel also referred to the decision of this court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 where it was, *inter alia*, held that for the purpose of determining whether a person dealing with a company has contracted in good faith, the common law definition of a *bona fide* purchaser is applicable, and the question to consider is whether the purchaser behaved honestly when it purchased the disputed properties. In that case, the court held that the purchaser was a *bona fide* purchaser for value and was therefore entitled to have the transfers of the disputed properties registered in its name.

[37] Learned counsel further submitted that the phrase "good faith" or "*bona fide*" must be read in the context of our Torrens system that provides for a central registration of the land titles, there are express provisions declaring the conclusiveness of the register in respect of matters appearing therein. Section 89 of the Code incorporates the "mirror" principle that the persons dealing with the registered owner of the land need not be concerned to ascertain the validity of the information pertaining to the land as indicated on the Register and the circumstances under which such proprietor came to be registered.

[38] Based on the foregoing arguments, it was submitted that it would be sufficient if the purchaser by himself or by his solicitors conduct the necessary searches at the Land Office, the Bankruptcy Department, the Register of Companies and undertake or exercise reasonable and ordinary conveying practice. The principle of good faith for the purpose of s. 340(3) of the Code should therefore be that of the general common law principle of good faith coupled with an added imposition of taking ordinary precautions and investigations of a reasonable prudent purchaser. Accordingly, it was submitted that questions 2 and 3 ought to be answered in the affirmative.

[39] With regard to the issue of the relevant time for the determination of "good faith", it was submitted that *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53 is not the authority on this issue.

[40] It was submitted that the determinative period should be from the time prior to the entry of the agreement for the sale and purchase of land up to the time of the presentation of the documents for registration. This is because upon presentation, the transaction for all intents and purposes has been

completed and the purchaser no longer has control over the transaction. After that, it is for the Registrar to determine whether the instrument of dealing and the accompanying documents are fit for registration. Once the Registrar ascertains that the instrument is fit for registration, he shall do so as prescribed under s. 304 of the Code. The time and date of registration shall be taken for all purposes as the time and date of its presentation.

[41] Secondly, it was submitted that by holding that the determinative period should be up to the time of the presentation of the documents for registration, it would be consistent with the common law principles. In *Pilcher v. Rawlins* (1871-72) LR 7 Ch App. 259, at 263 the English Court of Appeal held that "in itself it is immaterial whether the purchaser knows or not that another has an equitable interest prior to his own, provided he did not know that fact on paying his purchase-money".

[42] The following cases were also cited by learned counsel for the first defendant:

(a) *James Blackwood and Charles Ibbotson v. The London Chartered Bank of Australia* [1874] LR 5 PC 92;

(b) *Eaton v. Ldc Finance Ltd (in receivership)* [2012] NZHC 1105; and

(c) *Macmillan Inc v. Bishopsgate Investment Trust plc and Others (No. 3)* [1995] 3 All ER 747.

[43] Thirdly, it was submitted that presentation marks the completion of the land transaction. It is a common conveyancing practice in Malaysia that the presentation of the transfer and the relevant security documentation marks the completion of the sale and purchase transaction. Upon the successful presentation of the transfer and security documentation, the purchaser or if there is end financing involved, the purchaser's financier, would release the balance purchase price or the loan sum to the vendor. Upon payment of the balance purchase price or the loan sum, vacant possession of the property would be delivered by the vendor to the purchaser.

[44] As such, it would have an adverse impact on the conveyancing and banking industry for the court to decide that the determinative period should be at the time of the registration. The purchaser or the financial institution would be very reluctant to release the balance purchase price or the loan sum as they would not be protected. It was therefore submitted that on ground of public policy, the determinative period should be set at the time of the presentation of the documents for transfer which marks the completion of the sale and purchase transaction.

[45] It was therefore submitted that based on the legal principles submitted above and based on the facts of this case, the first defendant is a purchaser in good faith and for valuable consideration under the proviso to s. 340(3) of the Code.

[46] The next issue is the illegality point. Learned counsel for the first defendant submitted that the first defendant accepts the concurrent findings of fact by the High Court and the Court of Appeal that the second SPA had the effect of evading the payment of the real property gain tax and the stamp duty. However, the first defendant submitted that both the courts erred with the finding that the second SPA was void.

[47] It was also submitted that the object and the consideration in the second SPA were not unlawful under s. 24 of the Contracts Act despite the fact that it had the effect of reducing the amount payable for the stamp duty and the real property gain tax. In support of that argument, learned counsel cited the Federal Court cases of *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 and *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909.

[48] It was further submitted that the Stamp Act 1949 concerns only with the instrument and not the transaction. The compliance with the Stamp Act 1949 clearly not a prerequisite for the second SPA to be enforceable. The Stamp Act 1949 provides that a penalty is payable for late stamping and a person convicted with intent to defraud the Government of any duty shall be liable to a fine of five thousand Ringgit.

[49] The same argument applies to the Real Property Gains Tax Act 1976 because the Director General of Inland Revenue may make proper adjustment for the tax payable for any transaction that has the direct or indirect effect of evading or avoiding any duty or liability imposed under the Act. A fine and special penalty is payable for filing incorrect returns and wilful evasion of tax.

[50] The following cases were also cited for that proposition:

(a) *Curragh Investments Ltd v. Cook* [1974] 1 WLR 1559;

(b) *Asia Television Ltd & Anor v. Viwa Video Sdn Bhd & Other Cases* [1984] 2 CLJ 80; [1984] 1 CLJ (Rep) 72; [1984] 2 MLJ 304;

(c) *UMBC v. Pekeliling Triangle Sdn Bhd* [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474; [1991] 2 MLJ 559;

(d) *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81; and

(e) *The Co-operative Central Bank Limited v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313.

[51] To further support his argument on this issue, learned counsel for the first defendant referred to the recent decision of the English Supreme Court in *Patel v. Mirza* [2017] 1 All ER 191, where the English Apex Court had reviewed the issue of illegality in the contract. In that case, the English Supreme Court enunciated the proportionality test in dealing with a claim based on a contract which is in some way tainted with illegality.

[52] The last issue in this appeal is whether the second SPA is an instrument within the meaning of s. 340(2)(b) of the Code. It was submitted that the SPA is not an instrument of dealing within the definition of s. 292 of the Code. As such, the second SPA cannot be taken into consideration in considering whether the instrument is void or not. In support of that proposition learned counsel cited the case of *Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd* [2017] 4 CLJ 24.

[53] In the instant case, the memorandum of transfer was not challenged. Thus it cannot be a void instrument that is liable to be set aside under s. 340(2)(b) of the Code.

Submission Of The Plaintiff

[54] On the issue of when does the knowledge of good faith become relevant, learned counsel for the plaintiff submitted that under the proviso to s. 340(3) of the Code the protection accorded applies to a subsequent purchaser only when the purchaser becomes a registered proprietor or has a registered interest and that he had acquired the land in good faith and for valuable consideration. In support of that contention learned counsel for the plaintiff cited the case of *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53 and the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987.

[55] Learned counsel for the plaintiff submitted that after the instrument for transfer was presented, the registration was withheld as a Registrar's caveat was entered against the subject land. Before the registration of the transfer of the subject land, the first defendant had the knowledge of fraud on the subject land since the first defendant had attended the enquiry held at the Land Office by the third defendant and later when it applied to intervene in the application by the second defendant for the removal of the Registrar's caveat. Further, the first defendant opposed the third defendant's contention that the plaintiff should be added as a party in that application. Before the registration of the title in the name of the first defendant, the first defendant therefore had full knowledge of the plaintiff's rights and interest in the subject land.

[56] In support of the plaintiff's contention that the relevant time to ascertain whether the first defendant was a purchaser in good faith and for valuable consideration should be at the time of registration, learned counsel referred to the view expressed in *The Torrens System And Equitable Principles* by SY Kok where it was stated that during pre-registration stage, the unregistered but yet registrable instrument of transfer is still very much contractual in nature and binds the parties to the respective unregistered instrument of dealing only.

[57] Learned counsel for the plaintiff submitted that the decision of this court in *Kamarulzaman Omar & Ors* supported the plaintiff's case that the issue of *bona fide* purchaser must be determined at or prior to the time of registration.

[58] On the issue of 'good faith' learned counsel for the plaintiff submitted that it was a concurrent finding of both the High Court and the Court of Appeal that on the facts of the case, the appellant was not a *bona fide* purchaser. The appellate court ought not to interfere with the findings of facts by the court below unless there are manifest errors made by the court below. In support of that contention, learned counsel for the plaintiff cited the following two cases:

(a) *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; and

(b) *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19.

[59] Learned counsel for the plaintiff also submitted that both the High Court and the Court of Appeal were correct to apply the test of "a *bona fide* purchaser" as applied in *Au Meng Nam* and not the test as decided in *Ong Ban Chai.*

[60] With regard to the issue of illegality, learned counsel for the plaintiff submitted that the High Court made its finding that the purchase price of the subject land in respect of the sale from the second defendant to the first defendant was RM1,770,000 and was not RM900,000 as stated in the second SPA and further held that the agreement had the effect of depriving the Government of its revenue.

[61] It was submitted that Form 14A (instrument of transfer) was the primary document that the stamp duty was chargeable and payable under s. 4 of the Stamp Act 1949. Both Form 14A and the sale and purchase agreement should be considered as one and only transaction and they showed the collusion by the second defendant and the first defendant to deprive the Government of its revenue.

A

Decision Of This Court

[62] We will deal first with the issue of "purchaser in good faith". As mentioned earlier, there are two lines of authorities that dealt with this issue. Both the High Court and the Court of Appeal had dealt with the authorities on this issue admirably.

B

[63] The brief facts of *Ong Ban Chai* are these. The first appellant and the respondent signed an agreement of sale and irrevocable power of attorney in respect of the three lots of land which the respondent and his brother each held one half undivided share. There was a dispute as to the payment of the purchase price between the first appellant and the respondent.

C

[64] The first appellant later made use of the irrevocable power of attorney given by the respondent to him and transferred the half share of the respondent to himself. By a sale and purchase agreement, the first appellant, as the registered proprietor of the undivided one half share of the land, and the respondent's brother for his undivided half share through the power of attorney given by him to the first appellant, sold the said land to the second and third appellants free from all encumbrances.

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[65] The respondent as the plaintiff filed two suits in the High Court against several defendants. In the first suit, the respondent sued the first appellant as the defendant. In the other suit, the respondent sued five defendants. The learned trial judge gave decision in favour of the respondent and ordered, *inter alia*, one half undivided share in the three lots of land (which was at the material time the half share that was transferred by the first appellant to the fourth appellant) be registered in the name of the respondent.

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[66] One of the issues argued in the appeal against the High Court decision in the Court of Appeal was whether the second and third appellants and their nominee, the fourth appellant, are *bona fide* purchasers of the undivided half share from the first appellant.

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[67] The Court of Appeal dismissed the first appellant's appeal but allowed the second, third and fourth appellants' appeal. In other words, the Court of Appeal found the second, third and fourth appellants to be *bona fide* purchasers of undivided half share from the first appellant.

H

[68] It was contended *inter alia* that the second, third and fourth appellants are not *bona fide* purchasers as their minds had been infected by knowledge of the adverse claim of the respondent. For the fourth appellant, it was contended that knowledge of an adverse claim cannot defeat the registered title of the fourth appellant.

I

[69] At p. 670 of the report the Court of Appeal said: A

In the present appeal before us, the learned trial judge applied *Aik Ming* case and his reasons in his judgment are as follows:

> Since the second and third defendants have only paid a deposit when they executed the 1989 agreement and have yet to pay the balance of the full purchase price in May 1990, they are clearly not *bona fide* purchasers. Their minds have become infected with knowledge of the plaintiff's adverse claim and they were put on alert as to OBC's right to convey title of the subject property. Notwithstanding such knowledge, they proceeded to pay, as shown by their own evidence, through the fourth defendant, the balance of the purchase price and completed the transaction. B C

Is the trial judge correct in his interpretation of *Aik Ming* case? We therefore need to consider what is the ordinary meaning of the expression '*bona fide*' as ordinarily used and understood. The meaning of the expression '*bona fide*' may be found in legal dictionaries, eg, *Stroud's Judicial Dictionary and Words and Phrases* and also in numerous judicial decisions. We found that the common factor in all *bona fide* transactions is the absence of fraud, deceit or dishonesty. In other words, they are entered into in 'good faith' for valuable consideration. The expression 'good faith' in English is used synonymously with the Latin expression '*bona fide*'. D

In the present appeal before us, the material question is: when the second and third appellants entered into the 1989 agreement to purchase the three lots of land on 28 February 1989, having regard to the fact that the first appellant was on that date the registered proprietor of the half share of the three lots of land in question free of any trust and also free of any caveat by the respondent, did they acquire them in good faith and for valuable consideration? If the answer is in the positive, then the title of the fourth appellant is indefeasible; if otherwise the title is defeasible ... E F

[70] Further down, at pp. 672 & 673 of the report, the Court of Appeal ruled:

On the evidence, we are of the opinion that the title of the fourth appellant in respect of the one half share of the first appellant in the three lots of land is indefeasible under s. 340(3) of the NLC. It was acquired in good faith and for valuable consideration from the first appellant as registered proprietor through the second and third appellants against whom the respondent had failed to prove conspiracy to defraud. Registration of the said one half share in the name of the first appellant should not be set aside. The learned judge had erred in law in ordering the half share to be registered in favour of the respondent, to whom the learned judge had ordered the first appellant to pay costs and damages. In our opinion, although we sympathise with the predicament of the respondent, it is wholly unjust to penalise the second, third and fourth appellants for the fraud of the first appellant as well as the omission of G H I

A the respondent himself to challenge by appeal the specific findings of the learned judge and on the removal of his caveats adverted to earlier in this judgment. In this connection, we find the following passage from the judgment of Lord Diplock in the *Eng Mee Yong* case at p 214 to be helpful in our consideration of the case of the fourth appellant in the present appeal:

B

> The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code 1965, has as one of its principal objects to give certainty to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself, their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s. 340, the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality, and even in such cases a *bona fide* purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.

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[71] It is pertinent to note that the Court of Appeal in *Ong Ban Chai* referred to the decision of this court in *Pekan Nenas Industries Sdn Bhd*. One of the issues to be decided in that case was whether the purchaser was a *bona fide* purchaser for value of the disputed properties. The Federal Court, *inter alia*, held that for the purpose of deciding whether a purchaser has contracted in good faith, the common law definition of a *bona fide* purchaser is applicable and consequently the question to consider is: 'was the purchaser behaving honestly when it purchased the disputed properties.' It was further held that the purchaser had succeeded in establishing that it was at all material times, a *bona fide* purchaser for value and therefore entitled to have the transfers of the disputed properties in its name.

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[72] At pp. 855 and 856 of the report, the Federal Court had this to say:

> When, as here, the question arises whether a person dealing with a company has contracted in good faith there is no qualification on the definition of Purchaser; all that is necessary is that he should have contracted in good faith and have given value. In our view, for this purpose, the Common Law definition of who is a *bona fide* Purchaser is applicable and, for this, we would refer to *Hunt v. Fripp* [1898] 1 Ch. D 675 cited to us during the argument, where Byrne J said this (at p. 682):

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> > I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying "dealing *bona fide*" is equivalent to saying "dealing honestly", and that what I really have to consider is, Were the plaintiffs behaving honestly when they took the assignment in question from Emery?

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> The above observation of Byrne J was approved by Bingham J in *In re Bennett* [1907] 1 KB 149.
>
> In our view, therefore, when, as here, there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* Purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.

[73] On the other hand, in the more recent line of cases such as *Au Meng Nam* it was held that the purchasers have to investigate properly all matters relating to the sale of land and not to blindly accept what was said by the vendors. The purchasers have to take the ordinary precautions which ought to be taken in an acquisition of land before they can be considered to have proven themselves to be *bona fide* purchasers.

[74] At p. 554 of the report, Raus Sharif JCA (as he then was) had this to say:

> [42] Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.
>
> [43] Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:
>
> > To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.

A [44] So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.

B **[75]** Having carefully considered the two lines of authorities on this issue, the High Court chose to apply the law as stated in *Au Meng Nam* and gave the following reasons for preferring the test in *Au Meng Nam*:

54. In my judgment, the appropriate test to be applied remains that as set out in *Au Meng Nam v. Ung Yak Chew & Ors*. Accordingly, in order to
C discharge the burden of showing that it is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. A reasonably prudent purchaser in this context means a person with the knowledge, attributes and circumstances of the particular
D purchaser in question.

55. The views of the Court of Appeal in *Au Meng Nam v. Ung Yak Chew & Ors* is to be preferred over the decision of the same court in *Ong Ban Chai* for the reason that, in my respectful view, the court in the latter case had conflated the concepts of fraud and absence of good faith. At page
E 368H (MLJ) of the judgment, the learned judge took the view that, as the trial judge had cleared the second and third appellants and the fourth defendant from the charge of conspiracy, he ought to have proceeded to hold that the knowledge of the respondent's adverse claim ought not have prejudiced their case, which commentators have taken to mean that knowledge of a prior claim will not vitiate good faith. However, at page
F 372H, the judgment states, when discussing the Federal Court decision of *Pekan Nenas*:

> The Federal Court decided that to be a *bona fide* purchaser one should have contracted in good faith for value, and that knowledge of an adverse claim is no fraud.

G [56] However, the live issue in the appeal was not whether second and third appellants were fraudulent (since the trial judge had cleared them of conspiracy) but rather whether knowledge of an adverse claim vitiated good faith.

[76] The decision of *Au Meng Nam* was referred to by another panel of the
H Court of Appeal in *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577. At pp. 619 and 620 of the report, the Court of Appeal said:

[102] Premised on the above, we are convinced that the third defendant had concluded the sale without any proper investigation into the title or
I the persons who are the actual proprietors. The third defendant took advantage of the low purchase price and he acknowledged that this was done to evade tax. We failed to see why an enormous sum of money was

then paid to Wong. The third defendant offered no explanation. The third defendant in the conveyance of the land was under obligation to investigate properly all matters relating to the sale of the land. Clearly based on the facts and circumstances of this case the third defendant was negligent in not doing so. In our considered view a negligent purchaser cannot be accorded the protection of this court because a purchaser in good faith does not include a purchaser who has been negligent or who had kept his eyes shut (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 MLJ 136 (*Au Meng Nam*). This court in *Au Meng Nam* had held that the purchaser is under the obligation to investigate properly all matters relating to the sale and not just blindly accept what was claimed by the vendor as correct and genuine. The purchaser in that case clearly disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. Hence, when a purchaser failed to take ordinary precautions which ought to have been taken in such a matter, he is not entitled to the protection of the court.

[103] The case of *Au Meng Nam* reiterated the governing principles as propounded by Linley MR in *Oliver v. Hinton* [1989] 2 Ch 264. The Chancery Court in *Oliver v. Hinton* found the purchaser to be grossly negligent in failing to make inquires as to the title and relied on his agent completely. The Chancery Court through Linley MR held that:

> In the present case there has been no fraud on the part of the Defendant; there has only been gross negligence in the ordinary sense of words.
>
> ... negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an artificial sense of the word-such gross negligence, for instance as omitting to make any inquiry as to the title of the property. In that sense of the word, I think, there has been in the present case on the part of the Defendant negligence so gross as would have led the Court of Chancery to impute fraud of that kind to her. I do not mean to suggest that there was any fraud in fact.

[77] *Au Meng Nam* was also followed by another panel of the Court of Appeal in *Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal* [2014] 6 CLJ 485.

[78] The Court of Appeal in the instant case agreed with the High Court that in *Pekan Nenas*, the Federal Court was dealing with the issue of fraud under s. 340(2)(a) of the Code rather than the meaning of 'good faith', under the provision to s. 340(3) of the Code. The precise issue dealt with by the Federal Court in *Pekan Nenas* was whether mere knowledge of an unregistered claim on interest could amount to fraud within the meaning of s. 340(2)(a) of the Code. The Court of Appeal said:

A [83] It would therefore appear that this Court in *Ong Ban Chai*'s case, had indeed construed the test for fraud under section 340(2)(a) as being applicable in ascertaining whether a purchaser was *bona fide* or exhibited 'good faith'. This is, with great respect, erroneous. Therefore the trial judge did not err when he concluded that the Court had conflated the concepts of fraud and a *bona fide* purchaser under the proviso to section
B 340(3).

[84] It would be erroneous to equate the test applicable to establish fraud under section 340(2)(a) so as to defeat the title of a registered owner, to the assessment of a purchaser in good faith under the proviso to section 340(3).

C **[79]** We have carefully read *Ong Ban Chai* and *Pekan Nenas* and we are in agreement with both the High Court and the Court of Appeal that the Court of Appeal in *Ong Ban Chai* had conflated the concepts of fraud under s. 340(2)(a) and a *bona fide* purchaser under the proviso to s. 340(3) of the Code. When the Federal Court dealt with the issue of *bona fide* purchaser for
D value in *Pekan Nenas* it was confined to the issue of whether a person is necessarily disqualified from being a *bona fide* purchaser for value if he has not paid the full purchase price under the contract for sale and not in the context of the proviso to s. 340(3) of the Code. The observation made by the Federal Court on this issue was reproduced in para. 72 of this judgment. At
E pp. 854 of the report, the Federal Court said:

We now move on to consider point (2), which raises the question, whether even in a dispute involving the immediate parties to a sale and purchase transaction, a person is necessarily disqualified from being a *bona fide* Purchaser for value if he has not paid the full purchase price under
F the contract of sale? The onus was, of course, upon the Intervener/ Purchaser to prove that it was a *bona fide* Purchaser for value for this would be a matter peculiarly within its own knowledge. *(See, eg. Ong Chai Pang & Anor v. Valiappa Chettiar* [1971] 1 Mil 224, applying *Bhup Narain Singh v. Goldiul Chand Maliton & Ors.* LR 61 1A 115, per Lord Thankerton at p. 122).

G **[80]** In *Stroud's Judicial Dictionary of Words and Phrases*, 9th edn, it states that the words 'in good faith' have a core meaning of honesty. It further states that the term is to be found in many statutory and common law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another.

H **[81]** We are dealing with a system of conveyancing completely different from the English system. In *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196 the Federal Court had this to say:

I

> We are here dealing with a system of conveyancing completely different form the English system. We have to be very careful when attempt was made to introduce English law in such a case. The words of Lord Dunedin in *Haji Abdul Rahman & Anor. v. Mahomed Hassan* still ring in our ears:
>
> It seems to their Lordships that the learned judges, in these observations, have been much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment ...

[82] Under the circumstances, we are of the view that both the High Court and the Court of Appeal are right in preferring the broader concept of good faith as laid down in *Au Meng Nam*, that is to say, in order to discharge the burden of showing that it is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. The question of whether a purchaser has acted as a reasonably prudent purchaser or not would have to be decided on the particular facts of each case.

[83] We now move to the next issue, which is whether the relevant time at which good faith is to be ascertained is the time of the transaction entered into by the purchaser or the time it was registered as a proprietor.

[84] Both the High Court and the Court of Appeal held that the determinative period to assess good faith was from the time prior to the entry of the agreement for the sale and purchase of land up to the time of registration. Both courts cited *Muhammad bin Buyong* in support.

[85] In *Ong Ban Chai*, the Court of Appeal followed the decision of this court in *Pekan Nenas* that the material time at which there must be knowledge of an adverse claim or the means of knowledge is the time of entry into the transaction.

[86] The High Court chose not to follow *Ong Ban Chai* on this issue and it gave the following reasons:

(a) the ruling of the Court of Appeal did not form part of the *ratio decidendi* in *Ong Ban Chai*, as the timing of the determination of *bona fides* was not an issue in that case.

(b) as title is only acquired upon registration, any circumstances of the purchaser prior to registration may be validly taken into account in determining the issue of whether or not such purchaser was acting in good faith.

(c) although the decision in *Pekan Nenas* is good authority for the proposition that good faith is to be determined at the time of entry into the transaction for the purposes of determining *bona fides* under s. 26(b) of the Specific Relief Act 1950, the decision does not apply for the purposes of determining good faith under s. 340(3) of the Code, as the effects of the specific Legislative provision was not considered in either *Pekan Nenas* or *Ong Ban Chai*.

[87] The Court of Appeal agreed with the High Court that the observation made by the Court of Appeal in *Ong Ban Chai* does not form the *ratio decidendi* of that case. Further, the Court of Appeal said the statement of the Federal Court relied on by the Court of Appeal in *Ong Ban Chai* holding effectively that the relevant time to assess the good faith of a purchaser in s. 340(3) of the Code is inaccurate. In *Pekan Nenas*, the issue of good faith related primarily to whether the purchaser was entitled to rely on *Turquand*'s rule to establish that it had no knowledge of the irregularities within the vendor company, and to that extent was therefore, *bona fide*. It was in that context that it was held that the relevant time for the application of *Turquand*'s rule was the time of entry into the transaction.

[88] Accordingly, the Court of Appeal in the instant case held that events up to the actual registration of the first defendant as the registered proprietor on 11 February 2010 would be relevant, notwithstanding that the registration is stated to date back to 28 December 2006. According to the Court of Appeal, under the Torrens system the legal title passes to the transferee only upon registration of the transfer. As such, the purchaser's conduct until registration is material for the purpose of ascertaining *bona fides* or good faith.

[89] In *Mohammad bin Buyong* a transfer Form 14A was submitted to the Land Office, Gombak by the appellant on 14 August 1979. The form was signed by a person claiming to be the attorney of the second respondent as transferor and the appellant as transferee of 12/19 shares in the land for a consideration. An entry was made in the Register on the date of the presentation of Form 14A. After that nothing happened.

[90] On 20 November 1979, the Land Office received a letter from the second respondent stating that she had never at any time appointed that person to be her attorney, and that any document purporting to give such power of attorney was "false" or "forged". The Collector, after having examined the documents presented by the appellant, found that the instrument Form 14A was not fit for registration and rejected it.

[91] In his appeal to the High Court against the decision of the Collector under s. 418 of the Code, the appellant, *inter alia*, contended that he was the person lawfully entitled to the 12/19 shares of the said land by reason of the sale and purchase and in fact according to him he was the duly registered

proprietor. The High Court held that under s. 217(2) of the Code, the undivided share of any land transferred shall pass and vest in the transferee only upon registration of the transfer. The appellant could not resort to s. 340 of the Code since the facts clearly revealed that there was no registration. The learned judge, *inter alia*, made the following observation:

> ... Looking at the facts narrated earlier the primary and basic question to be answered first is whether the appellant can invoke section 340 of the Code at all. In other words is the appellant entitled to the protection of section 340 of the Code? The crucial words in section 340 are "any person or body for the time being registered as proprietor of any land." It would seem clear that one has to be registered as proprietor first before one's title can be described as indefeasible. In other words, registration is a pre-requisite of indefeasibility.

[92] In the instant case, the High Court was of the view that as title was only acquired upon registration, circumstances prior to registration may be validly taken to determine whether the purchaser was acting in good faith. Since the first defendant had, *inter alia*, attended the enquiry at the Land Office on 7 November 2008, the first defendant had knowledge of the existence of the plaintiff's adverse claim. By right, the first defendant should have rescinded the second SPA but did not. As such, the first defendant was not a purchaser in good faith within the ambit of s. 340(3) of the Code.

[93] In *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, the Federal Court had discussed the scope of s. 340(3) of the Code extensively. As such, for the purpose of this judgment, we would rely on the authoritative pronouncement made in that case on the scope of s. 340(3) of the Code and the application of the proviso to s. 340(3).

[94] In the instant case, the presentation of the relevant instrument of dealing for registration was made on 28 December 2006 and the registration, unfortunately was done only on 11 February 2010 which was more than three years after the presentation. The first defendant contended that the determinative period should be from the time prior to the entry of the agreement for second SPA (25 August 2006) up to the time of presentation only because what happened after the presentation was no longer within the control of the first defendant. The act of registration was carried out by the registering authority. Furthermore, under s. 304(1) of the Code, it is provided that the date of registration goes back to the time and date of presentation. As such, it was further contended that the title and interest in the land is vested on a person from the time and date of the presentation of the instrument.

[95] The first defendant's contention on this issue is consistent with the common law. In the English Court of Appeal case *Pilcher v. Rawlins* [1871-72] LR 7 Ch. App. 259, Lord Hatherley LC held that the mortgagees who acquired the legal estate of the trust properties conveyed to them by the trustees in breach of the trust held good title over the properties because the mortgagees are purchasers for valuable consideration who did not have notice of the invalid or fraudulent instruments at the time of the purchase.

[96] In *Eaton v. Ldc Finance Limited (in receivership)* [2012] NZHC 1105, the High Court of New Zealand said:

> [158] I note that in the case of single transactions, such as the paradigm of a market transaction for sale and purchase of an item of property, the test is of a *bona fide* purchaser for value without notice at the time of the transaction. Subsequent knowledge of breach of trust does not vitiate that transaction. That law is quite settled. It has an obvious purpose of facilitating the private market for the sale and purchase of assets by reinforcing certainty of title acquired by a purchaser for value without notice. I note a similar outcome is reached by the common law which will not declare a contract a sham unless both the party and the counterparty are agreed at the time of its making that it is a sham.

[97] However, in *Datuk Jagindar Singh,* Lee Hun Hoe CJ (Borneo), in delivering the judgment of the Federal Court, said (p. 202):

> ... In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

[98] There are two stages in the registration of title under the Torrens system, the pre-registration stage and post-registration stage. In pre-registration stage, the purchaser does not acquire any proprietary rights but contractual rights. Such rights, do not bind on the land but the contracting parties (see "*The Torrens System And Equitable Principles*" by SY Kok at p. 33). The first defendant only acquired the proprietary right in the subject land upon the registration of the title in its name on 11 February 2010.

[99] Apparently, there are two conflicting decisions from this court on what is the relevant time for the determination of 'good faith'. As mentioned earlier, in *Pekan Nenas*, this court held that the material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. On other hand, in *Datuk Jagindar Singh*, this court held that under the National Land Code in order to succeed against Arul (the subsequent transferee), the respondent (the registered proprietor) must prove

against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

[100] As rightly observed by the Court of Appeal, the ruling made by this court in *Pekan Nenas* as to the timing was in the context of whether the purchaser was entitled to rely on *Turquand*'s rule to establish that it had no knowledge of the irregularities within the vendor company. It had nothing to do with good faith in the context of s. 304(3) of the Code.

[101] In *Datuk Jagindar Singh*, this court made the ruling in the context of fraud under s. 340(2)(a) of the Code. As such, the decision in *Datuk Jagindar Singh* is more relevant to the instant case which concerns with the interpretation of s. 340(3) of the Code.

[102] Since the first defendant only acquired the proprietary right over the subject land after the registration, we are in agreement with the High Court and the Court of Appeal that the relevant time at which to determine whether a purchaser is indeed a purchaser in good faith and for valuable consideration would be at the time of the registration of the transfer. The purchaser can only seek protection under s. 340(3) of the Code if he is registered as the transferee pursuant to ss. 215 or 217 of the Code. Section 340(3) does not provide protection to a purchaser who has not been registered as a registered proprietor of the land. Accordingly, the purchaser's conduct until registration is material for the purposes of ascertaining his *bona fides*. Cognizance may be taken of his acts or omissions over period prior to the entry into the sale and purchase transaction of the land, up to the point in time when the purchaser is registered as a proprietor on the Register of Titles.

[103] We are unable to agree with the submission of learned counsel for the first defendant that it will have an adverse impact on the conveyancing and banking industry if the court decides to fix the determinative period to include the period after presentation until registration. The purchasers or the financial institutions will be reluctant to release the balance purchase price or the loan sum as they will not be protected. In our view, the conveyancing lawyers will find ways to deal with the problem, if there is going to be a problem arising from this decision.

[104] On the facts of this case, the High Court found that the first defendant had not proven, on a balance of probabilities, that it is a purchaser in good faith and for valuable consideration based on the following considerations:

(a) the first defendant had known of the existence of the plaintiff and the fact that the plaintiff was claiming the subject land, because their respective representatives had attended the PTG investigation meeting on 7 November 2008. The first defendant therefore acquired knowledge of the existence of the plaintiff's claim (even if not the precise nature of such claim) before the first defendant became the registered proprietor;

(b) it is inconceivable that the first defendant (through DWI) could not have known that the plaintiff was not the entity that had sold the land to the second defendant. The second defendant's representative was present at the investigation meeting, and one could imagine that the first question that DWI would have asked DW2 was, who was the plaintiff and/or PW2? DW2 would have, in all likelihood professed his ignorance and stated that this was not the person from whom he had bought the land. Thus, the state of knowledge of the first defendant was that it must have known that someone was asserting rights over the subject land, and that this person was not the same person from whom the second defendant had purchased the land;

(c) the first defendant had, at that point, a contractual remedy against the second defendant for rescission of the second SPA if it was shown that the plaintiff was the rightful proprietor of the land. This would have been, in my view, the most prudent course of action that a reasonable purchaser would have taken. Instead, the first defendant pursued completion of the second SPA;

(d) not only did it do so, it also resisted the third defendant's application to add the plaintiff as a party to the proceedings to remove the Registrar's caveat. A person acting in good faith would not have resisted the application, but instead would have taken steps to ascertain who the rightful proprietor was. The counsel for the first defendant argued that the reference to Pembangunan Orkid Desa Sdn Bhd at para. 9 of the relevant affidavit of DW4 in the proceedings to remove the Registrar's caveat was not a reference to the plaintiff, but to the impostor company. This was because at this point, it would not have been clear to the PTG that there were two companies claiming to be Pembangunan Orkid Desa Sdn Bhd. In my judgment, even if DW4 and the PTG were not aware of there being two companies, the first defendant would have known that someone other than the vendor in the first SPA was asserting its rights over the land, for the reason explained in sub-para. (b) *ante*; and

(e) the first defendant did not tender any evidence that it had sought clarification from the second defendant either on the Registrar's caveat entered at the request of the impostor company or on the claim by the plaintiff. In my view, a reasonably prudent purchaser would not only have been consternated by the delay in effecting registration (which eventually took over three years) after having paid RM1.77 million, but would have taken steps to recover, or at least demand recovery of, the purchase price paid.

[105] The question of whether the first defendant was a *bona fide* purchaser for value is a question of fact (see *Pekan Nenas*) and we are satisfied that both the courts below have applied the relevant law correctly to the facts of the case. It is trite law that the appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusted the primary task of evaluation of the evidence unless the trial court has so fundamentally misdirected itself (see *Sivalingam a/l Periasamy; Lee Ing Chin @ Lee Teck & Ors*). On the totality of the evidence, we do not find any misdirection by the trial court in this case.

[106] The next issue for determination is the illegality point. The High Court found that the real purchase price of the subject land was RM1,770,000 and the second SPA had the effect of evading the payment of real property gain tax on the undeclared profit and the payment of stamp duty on the additional consideration. As such, the second SPA was void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950. These findings were upheld by the Court of Appeal. The Court of Appeal then held that as the underlying contract was void, the instrument of dealing effecting the transfer to the first defendant was accordingly void.

[107] The High Court relied on the decisions in *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674 and *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] 28 MLJ 143 to make its finding that an agreement that deprived the Government of its revenue was illegal and unenforceable on grounds that it was contrary to public policy.

[108] Case law seems to suggest that the courts should be slow to find illegality and strike down commercial transactions. In *Lori Malaysia Bhd*, one of the issues before the court was whether a breach of s. 67 of the Companies Act 1965 had any civil consequences. At p. 1015 (CLJ); p. 104 (MLJ) of the report, the Federal Court had this to say:

> It is true that s. 3 of the Civil Law Act, 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect, that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by statute law. We therefore heartily agree with the Court in *Chung Khiaw Bank* that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. But, having said that, we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law.

A Indeed, twenty years ago, this is precisely what Raja Azlan Shah CJ (now HRH the Sultan of Perak) had done in *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1979] 2 MLJ 144. Here is what his Lordship said (at p 247C), when speaking for the old Federal Court:

> We bear in mind the much quoted and common sense warning by
B Devlin J in *St John Shipping Corp v. Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690, 691) against a too ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

[109] In *Co-operative Central Bank Ltd (In receivership)* the court had to decide
C the issue of the validity of two loans and charge transactions made in contravention of s. 133(1) of the Companies Act 1965 and whether there were any civil consequences which flowed from the breach. The Federal Court, *inter alia*, made the following observation:

> To summarise, our conclusion is that accepting that the charge
D transactions did breach s. 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the loan or the charge transactions, regard being had to the context and purpose of s. 133(1), and especially the principle underlying s. 133(5), as explained above, which regrettably the learned judge failed to take into account or to give proper weight to, with the result that his judgment
E cannot stand.

[110] In *Thong Foo Ching & Ors*, the respondent, a Japanese national, had agreed to purchase two pieces of land belonging to the appellants. The parties were advised by their common solicitor that the transaction needed the approval of the Foreign Investment Committee, in line with the
F Government's "Guidelines for the Regulations of Acquisition of Assets, Merges and Take-overs." The parties were not inclined to abide by the directive in the Guidelines, as compliance thereof would incur additional payment of taxes and stamp duty to the Government.

[111] The parties then circumvented the Guidelines and executed two
G separate agreements. By this arrangement, the Government had lost RM80,000 by way of real property gains tax and RM27,000 by way of stamp duty payable.

[112] In the trial, it was submitted that the scheme of circumventing the
H Guidelines had contravened the Real Property Gains Tax Act 1976 and the Stamp Act 1949, resulting in the loss of revenue to the Government, and that being so, both agreements were contrary to public policy or tainted with illegality and were null and void and unenforceable. The High Court, *inter alia*, held that the question of illegality did not arise by the mere execution of the two agreements.

I

[113] On appeal by the appellants, the Court of Appeal, *inter alia*, held that the two agreements contravened the Real Property Gains Tax Act 1976 and the Stamp Act 1949 and therefore fell within the ambit of s. 24(b) of the Contracts Act 1950. Siti Norma binti Yaakob JCA (as she then was) had this to say:

> My views on this contention are that the respondent may never have intended to avoid any statute but the consequence of this action has the same effect as the very intention that he never had. As such it matters not that it was the third appellant who should have paid the full property gains tax had the properties been sold at their true value of RM6.5 million. The respondent was very much a party to the scheme and in this respect both the respondent and the third appellant were represented by a common solicitor, PW2, a person with 11 years standing at the Bar, seven years of which was concerned mainly with a banking and conveyancing work. In his own admission, PW2 was all too aware that apart from the guidelines the sale and purchase of the properties attracted both Act 169 and Act 378.
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> Under these circumstances can the court countenance such a transaction? I say "no" as the two agreements, if allowed to be enforced, would defeat Acts 169 and 378 and therefore fall within the ambit of s. 24(b) of Act 136 ...
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> The legal effect of this arrangement is best summed up by the Federal court in the case of *Datuk Ong Kee Hui v. Sinvium Anak Mutit* [1983] 1 MLJ 36 in the following manner:
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> > As the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore void *ab initio* and the parties are outside the pale of the law. The respondent being a party thereto cannot claim any remedy under this arrangement. He is not entitled to the refund of the balance of his remuneration kept by the party, nor could he claim any damages, special or general, in connection with his forced resignation: *ex turpi causa non oritur action.* Even if he had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. *Waugh v. Morris* [1873] LR 8 QB 202, *J.M. Allan (Merchandising) Lt. v. Cloke & Anor* [1963] 2 QB 340. On the other hand the appellant is entitled to rely upon illegality in his defence in order to meet the respondent's claim. The reason why the law allows the appellant to do so, as explained by Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp, 341, 343; 98 ER 1120, 1121 is due to the general principle of public policy contained in the maxim *ex*

A *dolo malo non aritur actio.* The court will not assist a person to pursue his claim if it arises *ex turpis* and when the defendant is equally at fault the court will apply the maxim *potior est conditio defendentis.* The learned trial judge therefore should have dismissed the respondent's suit *in toto*.

B **[114]** In *Palaniappa Chettiar*, the plaintiff bought 40 acres of rubber land. At that time, he already owned 99 acres of rubber land and with the new purchase, his total holding of the rubber land exceeded 100 acres. The Rubber Regulations (No. 17 1934) were passed so as to control the production of rubber. They drew a distinction between holdings of less than 100 acres and holding of more than 100 acres.

C

[115] In order to avoid these Regulations, the plaintiff in 1935 transferred 40 acres of his rubber land to his son, the defendant. It was found as a fact by the trial judge that no money was paid by the defendant for the transfer.

D **[116]** In 1950, the defendant having refused to execute a power of attorney in respect of the property in favour of the plaintiff to enable the plaintiff to sell it, the plaintiff brought an action for a declaration that the defendant held the property in trust for the plaintiff and for an order for the property to be retransferred to him.

E **[117]** The trial judge took the view that the plaintiff had practiced a deceit on the public administration of the country in order to get a personal benefit but held that the plaintiff's possible turpitude was no bar to the success of his claim. On appeal to the Privy Council, it was held that as the fraudulent purpose had in fact been carried out the plaintiff was precluded from obtaining the aid of the court. The Privy Council observed:

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> Their Lordships notice that the trial Judge (Smith J) in this case was also the trial Judge in *Sajan Singh v. Sardara Ali, supra.* In that case he had applied the maxim *"ex turpi causa non oritur action":* but having been over-ruled by the Court of Appeal, he felt that in the present case he ought not to apply the maxim. He said: "In view, however, of the Court of
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> G Appeal decision in *Sardara Ali v. Sarjan Singh,* it appears that the plaintiff's possible turpitude is no reason for denying him the orders which he seeks." The difference, however, is this: In *Sardara Ali v. Sarjan Singh* the plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his cause of action on an immoral or illegal act. He was held entitled to recover. But in the present
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> H case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield. "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act," see *Holman v. Johnson* at page 343. Their Lordships are of opinion that the Courts should not lend their aid to the father to obtain
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> I a re-transfer from the son.

[118] However, in *Asia Television Ltd & Anor*, the Federal Court, speaking in the context of the Films (Censorship) Act 1952, held that: A

> On a careful evaluation of the relevant and requisite statutory provisions and a consideration of the question of any interplay between them we can find no sufficient *nexus* such as would satisfy the test laid down in *Curragh Investments Ltd. v. Cook (supra).* B
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> There is no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they are otherwise qualified although they may be in breach of the provisions of the Films (Cencorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions. If it were otherwise so as to result in the defeasance of the appellants' rights under the Copyright Act in this case, then it would be equally logical to deprive a person of his rights under that Act if he commits an offence of strict or vicarious liability, such as for instance an offence under the excise laws, without any intention or *mens rea.* C
>
> In the light of the matters we have adumbrated we accordingly find that non-compliance with the provisions of the Films (Cencorship) Act does not affect the acquisition of copyright under the Copyright Act. Any infringement of the provisions of the former Act attracts the criminal penalty provided for therein, but if this were also to result in defeating the appellants' rights under the Copyright Act the implications in the matter of economic loss would far exceed the penalty imposable for contravening the censorship requirements of the earlier Act. As we have pointed out there is no express or implied prohibition linking the respective requirements of the two statutes and accordingly no *nexus* to justify reading them conjunctively and importing the requirements of one as a condition precedent to the operation of the other. D E F

[119] In *Curragh Investments Ltd* Megarry J said (at pp. 1563 and 1564):

> With respect, that argument seems to me to be completely fallacious. I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the courts may in some cases find that the contract itself is stricken with illegality. But for this to occur there must be a sufficient *nexus* between the statutory requirement and the contract. If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (eg, by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory G H I

A requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Acts) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an B English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Act of 1948, for example, for not filing its annual returns in due time. Such a doctrine, for which I can see no justification, would result in chaos. If in the present case I assume that the vendor is in demonstrable breach of sections 407 and 416, I am still C quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected. Furthermore, the illegality on which the purchaser is relying appears to be somewhat delicately adjusted; for in order to sustain the purchaser's case it must invalidate the covenants for title which the D vendor must give and yet leave unaffected the contract for sale itself, upon which the purchaser must rely to support his caution on the land register. Such an illegality is too selective in its nature to be true.

[120] The Stamp Act 1949 concerns only the instruments and not the transactions. In *UMBC*, at p. 478 (CLJ); p. 560 (MLJ) of the report the E Supreme Court *inter alia*, observed:

> We ought to bear in mind the above-quoted rules and that the object of the Act relating to stamp duties is to raise revenue by requiring documents of certain kinds to be stamped. In other words, the Stamp Act tax documents and not transactions.

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[121] In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181, one of the issues considered by the Federal Court was whether the contracts were void for illegality of having contravened the Housing Developers (Control and Licensing) Rules 1970. The Federal Court held that the Rules did not affect the validity of the contracts. Salleh Abas G CJ (as he then was) said:

> In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s. 24 quoted above, although the appellant may well be guilty of an H offence under r. 17 for contravening r. 11(1) of the Housing Developers (Control & Licensing) Rules 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

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[122] The *dicta* of Salleh Abas CJ in *Kin Nam Development Sdn Bhd* was applied by this court is *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909. The issue in that case was where the sale and purchase agreements of properties between housing developer and the purchasers are illegal and/or contrary to public policy, whether the financing agreements for purchase of such properties are also void for illegality and/or contrary to public policy. This court held that the financing agreement was valid and not void regardless of the alleged illegality of the sale and purchase agreements.

> [27] It is to be noted there is no illegal object or consideration under the financing agreement. It strains credulity to suggest that the consideration or object of a loan facility to advance money to the appellants to enable them to purchase the apartments is unlawful. This is unlike providing financing for the purchase of illegal drugs or illegal arms. The object or consideration of the SPA for the sale and purchase of the apartments is also not unlawful. In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181, Salleh Abas CJ (Malaya) (as he then was) considered the application of s. 24 of the Contracts Act and at p. 186 held; ...

[123] In *Patel*, the English Supreme Court had the opportunity to evaluate the state of the common law in respect of illegality in contracts, as found on the maxim of Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp 341 that 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act' and the 'reliance principle' as stated in *Bowmakers Ltd v. Barnet Instruments Ltd* [1944] 2 All ER 579 and *Tinsley v. Milligan* [1993] 3 All ER 65. In that case, the principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment. At p. 220 of the report, Lord Toulson had this to say:

> [101] That is a valuable insight, with which I agree. I agree also with Professor Burrows's observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

[124] Commenting further on the danger of overkill, Lord Toulson cited the words of Devlin J in *St John Shipping Corp v. Joseph Rank Ltd* [1956] 3 All ER 683 where the learned judge dealt with the issue of whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression and said:

> [108] The integrity and harmony of the law permit – and I would say require – such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. *ParkingEye* is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.
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> [109] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.
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> [110] I agree with the criticisms made in *Nelson v. Nelson* and by academic commentators of the reliance rule as laid down in *Bowmakers* and *Tinsley v Milligan,* and I would hold that it should no longer be followed. Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: *Singh v. Ali* [1960] 1 All ER 269 at 272, [1960] AC 167 at 176, and *Sharma v. Simposh Ltd* [2011] EWCA Civ 1383, [2012] 2 All ER (Comm) 288, [2013] Ch 23 (at [27]-[44]). There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for

example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question.

[125] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceeding as a debt to the Government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd*. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.

[126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction.

[127] The final issue for our determination is whether the second SPA is an instrument for the purpose of s. 340(2)(b) of the Code.

[128] The High Court held that as the second SPA is void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950, the transfer of the subject land from the second defendant to the first defendant was obtained by means of a void instrument, which in turn renders the title of the first defendant defeasible pursuant to s. 340(2)(b) of the Code.

[129] In view of our finding that the second SPA is not void we do not find it necessary to deal with this issue.

Conclusion

[130] For the reasons given above we would answer the questions of law posed in this appeal as follows:

Question 1

The relevant time for determination of good faith of a subsequent purchaser for the purposes of s. 340(3) of the Code is the circumstances prior and at the time of the registration of the transfer by the land officer.

A Questions 2 and 3

The concept of good faith for the purpose of s. 340(3) of the Code is wider than the general common law principle of good faith. In addition to the absence of fraud, deceit or dishonesty, a subsequent purchaser is also required to take ordinary precautions and investigations that of a
B reasonable prudent purchaser. Whether a subsequent purchaser acts as a reasonable prudent purchaser is a question of fact to be decided based on the facts of each case.

Question 4

C Whether mere knowledge of an adverse claim vitiates good faith of a subsequent purchaser who is not fraudulent, deceitful or dishonest will depend on the facts of each case.

[131] We do not find it necessary to answer questions 5 and 6.

D **[132]** The appeal is therefore dismissed with costs. The decisions of the courts below are affirmed.

[133] This judgment is given pursuant to sub-s. (1) of s. 78 of the Courts of Judicature Act 1964 as one member of this panel, Prasad Sandosham Abraham FCJ, has since retired.

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